

Michigan Law Review

Volume 61 | Issue 3

1963

Embezzled Funds as Taxable Income: A Study in Judicial Footwork

Jerome B. Libin

Member of the District of Columbia and Illinois Bars

George R. Haydon Jr.

Member of the Missouri Bar

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Constitutional Law Commons](#), [Criminal Law Commons](#), [Jurisprudence Commons](#), [Supreme Court of the United States Commons](#), and the [Tax Law Commons](#)

Recommended Citation

Jerome B. Libin & George R. Haydon Jr., *Embezzled Funds as Taxable Income: A Study in Judicial Footwork*, 61 MICH. L. REV. 425 (1963).

Available at: <https://repository.law.umich.edu/mlr/vol61/iss3/2>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

MICHIGAN LAW REVIEW

Vol. 61

JANUARY 1963

No. 3

EMBEZZLED FUNDS AS TAXABLE INCOME: A STUDY IN JUDICIAL FOOTWORK

*Jerome B. Libin** and *George R. Haydon, Jr.***

DESPITE the narrow scope of its application, the question whether embezzled funds are includible in gross income in the year of acquisition has perplexed the courts for a number of years and has even received consideration by the Supreme Court on two separate occasions.

While the Treasury early announced that funds misappropriated through embezzlement would be deemed taxable to the embezzler in the year of acquisition,¹ the lower courts disagreed over the validity of this rule. A conflict of opinion in the courts of appeals² ultimately led the Supreme Court to review the question for the first time in 1946. In *Commissioner v. Wilcox*,³ decided by a vote of seven to one, the Court held that funds which had been misappropriated by a bookkeeper who had been convicted of embezzlement did not constitute taxable income to him in the year of acquisition. The Treasury promptly modified its position in accordance with the *Wilcox* decision.⁴

A 1959 decision by the Court of Appeals for the Seventh Circuit brought the issue back to the Supreme Court for a second time. The case involved a union official who, after having been convicted of embezzling union funds, was also convicted of tax evasion for failing to report the misappropriated funds as income during the years 1951 through 1954. On appeal, the taxpayer had contended that his conviction should not stand for the reason that, under the *Wilcox* decision, the funds were not taxable to him in the years of misappropriation. The Seventh Circuit, re-

* Member of the District of Columbia and Illinois Bars.—Ed.

** Member of the Missouri Bar.—Ed.

¹ G.C.M. 16572, XV-1 CUM. BULL. 82 (1936).

² Compare *Kurrie v. Helvering*, 126 F.2d 723 (8th Cir. 1942) (holding embezzled funds taxable), with *Wilcox v. Commissioner*, 148 F.2d 933 (9th Cir. 1945), and *McKnight v. Commissioner*, 127 F.2d 572 (5th Cir. 1942) (holding such funds non-taxable).

³ 327 U.S. 404 (1946).

⁴ G.C.M. 24945, 1946-2 CUM. BULL. 27.

fusing to follow *Wilcox*, held that the embezzled funds should have been reported by the taxpayer and that his conviction for tax evasion was proper.⁵ The court relied on the intervening decision of the Supreme Court in *Rutkin v. United States*,⁶ in which the Court, dividing five to four, had ruled that money obtained by extortion is taxable to the extortioner. In view of the square conflict between the decision of the Seventh Circuit and its earlier *Wilcox* decision, the Supreme Court agreed to review the case.⁷ By a vote of six to three it held, in *James v. United States*,⁸ that embezzled funds do indeed constitute taxable income to the embezzler in the year of misappropriation, and accordingly overruled *Wilcox*. Yet, despite the conclusion that the embezzled funds were taxable, the taxpayer's conviction for tax evasion was reversed as the result of a sharp division on the Court regarding the appropriate basis for disposing of the case.

The *James* case might not be worthy of extensive comment if its only significance rested on the decision that embezzled funds constitute taxable income in the year of misappropriation. But close analysis of the *five separate opinions* that were written indicates that *James* may have considerable significance beyond its precise holding.

I. THE EXPANDING CONCEPT OF TAXABLE INCOME

Perhaps the most important feature of the *James* case is its status as the first case in which the entire Supreme Court has considered the scope and meaning of section 61(a), the "gross income" provision of the 1954 Internal Revenue Code. By virtue of this fact, any insight as to the continued authority under section 61(a) of decisions construing prior "gross income" provisions, and as to the scope of section 61(a) in a constitutional sense, must at present be gleaned primarily from the *James* decision.

A discussion of the power of Congress to tax income typically begins by reference to the sixteenth amendment, which provides: "The Congress shall have power to lay and collect taxes on income, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."⁹ However, the power of Congress to tax income

⁵ *United States v. James*, 273 F.2d 5 (7th Cir. 1959).

⁶ 343 U.S. 130 (1952).

⁷ 362 U.S. 974 (1960).

⁸ 366 U.S. 213 (1961).

⁹ U.S. CONST. amend. XVI.

did not stem from ratification of the sixteenth amendment in 1913. Article I of the Constitution granted Congress full power "to lay and collect taxes,"¹⁰ subject to the limitation that "direct taxes" must be apportioned among the states on the basis of population.¹¹ In *Pollock v. Farmers Loan & Trust Co.*,¹² decided in 1895, a divided Supreme Court had held that a tax on income in the form of rents, dividends, and interest was equivalent to a "direct tax" on the income-producing property itself, and, since not apportioned, was unconstitutional. The sixteenth amendment was an outgrowth of the Supreme Court's decision in the *Pollock* case, and was designed solely to eliminate the requirement of apportionment which in *Pollock* had been held applicable to the taxation of certain types of income.¹³

The Revenue Act of 1913, the first income tax statute passed after adoption of the sixteenth amendment,¹⁴ and all subsequent income tax statutes enacted by Congress through the Internal Revenue Code of 1939, contained a disjunctive catch-all definition of "gross income" subject to tax—"gains or profits and income derived from any source whatever."¹⁵ In thus defining statutory income, Congress might have contemplated any one of three different possibilities. It could have intended: (1) to include something less than the "income" embraced by the sixteenth amendment; (2) to equate the statutory phrase with sixteenth amend-

¹⁰ U.S. CONST. art. I, § 8, cl. 1.

¹¹ U.S. CONST. art. I, § 2, cl. 3, and art. I, § 9, cl. 4. Other restrictions not relevant for purposes of this discussion are that: (1) "Duties, Imposts and Excises" must be "uniform throughout the United States" (U.S. CONST. art. I, § 8, cl. 1), and (2) no tax or duty may be laid on exports (U.S. CONST. art. I, § 9, cl. 5).

¹² 157 U.S. 429, *aff'd on rehearing*, 158 U.S. 601 (1895).

¹³ See generally SURREY & WARREN, CASES ON FEDERAL INCOME TAXATION 1-12 (1960 ed.).

¹⁴ In *Brushaber v. Union Pac. R.R.*, 240 U.S. 1 (1916), the Supreme Court upheld the constitutionality of the Revenue Act of 1913, the first income tax act to be enacted after ratification of the sixteenth amendment. Speaking through Mr. Chief Justice White, the only remaining member of the Court who had participated in the *Pollock* decision, in which he had dissented, the Court explained the purpose of the sixteenth amendment as follows: "It is clear on the face of this text that it [the sixteenth amendment] does not purport to confer power to levy income taxes in a generic sense—an authority already possessed and never questioned—or to limit and distinguish between one kind of income taxes and another, but that the whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived." 240 U.S. at 17-18.

¹⁵ Internal Revenue Code of 1939, ch. 1, § 22(a), 53 Stat. 9; Revenue Act of 1938, ch. 289, § 22(a), 52 Stat. 457; Revenue Act of 1936, ch. 690, § 22(a), 49 Stat. 1657; Revenue Act of 1934, ch. 277, § 22(a), 48 Stat. 686; Revenue Act of 1932, ch. 209, § 22(a), 47 Stat. 178; Revenue Act of 1928, ch. 852, § 22(a), 45 Stat. 797; Revenue Act of 1926, ch. 27, § 213, 44 Stat. 23; Revenue Act of 1924, ch. 234, § 213, 43 Stat. 267; Revenue Act of 1921, ch. 136, § 213, 42 Stat. 237; Revenue Act of 1918, ch. 18, § 213, 40 Stat. 1065; Revenue Act of 1916, ch. 463, § 2(a), 39 Stat. 757; Income Tax Act of 1913, ch. 16, § 11B, 37 Stat. 167. This language was first used in the Civil War income tax acts.

ment "income"; or (3) to encompass not only sixteenth amendment "income" but also all gains which would not be subject to the "direct tax" limitation.

In the landmark case of *Eisner v. Macomber*,¹⁶ the express provision in the Revenue Act of 1916 that the disjunctive definition of "gross income" was intended to encompass stock dividends¹⁷ was challenged on constitutional grounds. After tracing the history of the sixteenth amendment, the Court stated:

"A proper regard for its genesis, as well as its very clear language, requires also that this Amendment shall not be extended by loose construction, so as to repeal or modify, *except as applied to income*, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal."¹⁸

The Court adopted as the definition of "income" embraced by the sixteenth amendment the definition it had enunciated in two earlier cases¹⁹—"the gain derived from capital, from labor, or from both combined"—adding that "it be understood to include profit gained through a sale or conversion of capital assets."²⁰ After thus limiting the possible *sources* of "income" covered by the sixteenth amendment, the Court went farther and read into the word "derived" the so-called "realization" doctrine, thereby adding the further restrictions that a gain must be *severed* from capital and come under the *dominion* of the taxpayer to constitute "income" as the Court had defined it.²¹ Dividing five to four, the Court concluded that the recipient of a true stock dividend "has received nothing that answers the definition of income within the meaning of the 16th Amendment."²² It was accordingly held

¹⁶ 252 U.S. 189 (1920).

¹⁷ In *Towne v. Eisner*, 245 U.S. 418 (1918), the Supreme Court had held that the disjunctive definition of "gross income" contained in the Revenue Act of 1913 did not include stock dividends within its scope. Congress reacted to the *Towne* decision by expressly providing, in § 2(a) of the Revenue Act of 1916, that the disjunctive definition was intended to encompass stock dividends.

¹⁸ 252 U.S. at 206. (Emphasis added.)

¹⁹ *Doyle v. Mitchell Bros.*, 247 U.S. 179, 185 (1918), and *Stratton's Independence v. Howbert*, 231 U.S. 399, 415 (1913), both decided under the Corporation Tax Act of 1909.

²⁰ 252 U.S. at 207.

²¹ "'Derived—from—capital';—'the gain—derived—from—capital,' etc. Here we have the essential matter: *not* a gain *accruing* to capital, *not* a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital however invested or employed, and *coming in*, being '*derived*,' that is, *received*, or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal;—that is income derived from property. Nothing else answers the description." *Ibid.*

²² *Id.* at 211.

that Congress had no power to tax such a dividend without apportionment. The *Macomber* decision thus indicated that a majority of the Supreme Court viewed its definition of sixteenth amendment "income" as the equivalent of the statutory disjunctive clause defining "gross income."

But the restrictive requirements as to *severance* and *dominion* supplied by the Court in *Macomber* were gradually lessened as the Court began to whittle away at the *Macomber* definition of "income" in cases presenting a variety of factual situations.²³ Indeed, in *Helvering v. Horst*,²⁴ the Court declared that the so-called "realization" doctrine relied on so heavily in *Macomber* was a rule "founded on administrative convenience."²⁵ And in *Wilcox* and *Rutkin*, the two leading cases involving the taxability of unlawful gains decided prior to *James*, the limitations on *source* laid down in *Macomber* were seemingly forgotten.

In 1946 the Court was confronted in *Wilcox* with the question whether embezzled funds fell within the reach of the disjunctive statutory definition of "gross income." Although it pointed to earlier decisions which had interpreted the disjunctive clause as being "cast in broad, sweeping terms" and indicating "the purpose of Congress to use the full measure of its taxing power within those definable categories,"²⁶ the Court nevertheless proceeded to hold that a taxable gain was conditioned upon "(1) the presence of a claim of right to the alleged gain and (2) the absence of a definite, unconditional obligation to repay or return that which would otherwise constitute a gain."²⁷ It concluded that "the bare receipt

²³ Thus, shortly after *Macomber*, the Court held that a stock dividend was taxable if made as the result of a separation of assets by the distributing corporation [*United States v. Phellis*, 257 U.S. 156 (1921), and *Rockefeller v. United States*, 257 U.S. 176 (1921)], or if it caused a change in the shareholder's proportionate interest in the corporation [*Koshland v. Helvering*, 297 U.S. 702 (1935), and *Marr v. United States*, 268 U.S. 536 (1925)]. It was at least questionable whether such stock dividends satisfied the "severance" requirement set forth in *Macomber*. In *Helvering v. Bruun*, 309 U.S. 461 (1940), the Court held that, upon termination of a lease, the increase in value of the underlying property which resulted from improvements made by the lessee was taxable to the lessor under the disjunctive definition of "gross income," as then contained in the Revenue Act of 1932, notwithstanding the lack of "severance" involved. Similarly, the "dominion" concept as enunciated by the Court in *Macomber* was considerably broadened in *Helvering v. Clifford*, 309 U.S. 331 (1940), in which the grantor of a short-term trust, of which his wife was beneficiary and under which he had retained substantial control over the corpus, was regarded as in substance the owner of the corpus and accordingly was taxed on the trust income.

²⁴ 311 U.S. 112 (1940).

²⁵ *Id.* at 116. The Court held in *Horst* that the owner of income-producing bonds could be taxed on the interest from such bonds even though he had given the interest-bearing coupons to his son prior to maturity.

²⁶ 327 U.S. 404, 407 (1946).

²⁷ *Id.* at 408.

of property or money wholly belonging to another lacks the essential characteristics of a gain or profit within the meaning of § 22(a) [the "gross income" provision of the 1939 Internal Revenue Code]."²⁸ But, in thus concluding that a proper interpretation of the disjunctive phrase did not encompass embezzled funds, the Court made no reference to the *Macomber* decision or its declaration that the *source* of taxable "income" had to be capital, labor or both combined.

Then, six years later, the Court held in *Rutkin* that funds obtained by extortion, although constituting "unlawful receipts," were nevertheless within the reach of the "gross income" provision. Its interpretation of the statutory provision as reaching extorted funds was explained as follows:

"We think the power of Congress to tax these receipts as income under the Sixteenth Amendment is unquestionable. The broad language of § 22(a) supports the declarations of this Court that Congress in enacting that section exercised its full power to tax income. We therefore conclude that § 22(a) reaches these receipts."²⁹

The "claim of right" approach taken in *Wilcox* was virtually ignored. But, while apparently altering its prior interpretation of the "gross income" provision with respect to unlawful receipts, the Court indicated its continued adherence to the general notion that the sixteenth amendment "income" concept established the outer limits of the scope of the disjunctive clause. Again, however, no attempt was made to satisfy the *Macomber* standard respecting the *source* of taxable "income," which seemingly would have precluded the taxation of funds derived from unlawful activity such as extortion.

While *Macomber's* demands had been considerably lessened not until the Court's 1955 decision in *Commissioner v. Glenshaw Glass Co.*³⁰ was it suggested that the disjunctive clause of the "gross income" provision encompassed something *more* than sixteenth amendment "income." *Glenshaw Glass* involved the taxability of punitive damages awarded in successful civil antitrust litigation—a so-called "windfall" to the taxpayer. The Commissioner argued that it was immaterial whether punitive damages constituted "income" within the meaning of the sixteenth amendment, since Congress had the power under article I of the Consti-

²⁸ *Ibid.*

²⁹ 343 U.S. at 138-39.

³⁰ 348 U.S. 426 (1955).

tution to tax such receipts without apportionment, even before the adoption of that amendment.³¹ It was the Commissioner's contention that the statutory expression "gains . . . derived from any source whatever" in the "gross income" provision added something to the statutory term "income."

"The word 'gain' in the statute, which is valid under Article I of the Constitution, and not the word 'income' in the Sixteenth Amendment, therefore, controls the question whether payments of punitive damages are taxable to the recipient."³²

The taxpayer conceded that Congress could constitutionally tax punitive damages, but asserted that section 22(a) did not reach such receipts on the ground that the *Macomber* definition of sixteenth amendment "income" had established the meaning of the entire statutory catchall clause. Since punitive damages were not derived from capital, labor or both combined, it was argued, they were not subject to tax. Mr. Chief Justice Warren, speaking for a majority of the Court, made it clear at the outset that the question involved was one of statutory construction rather than constitutional power. After emphasizing the entire disjunctive clause of the statute—"gains or profits and income derived from any source whatever"—the Chief Justice stated that the Court "has given a liberal construction to this broad phraseology in recognition of the intention of Congress to tax *all gains except those specifically exempted*."³³ Since punitive damages constituted undeniable accessions to wealth which had been clearly realized and which were under the complete dominion of the taxpayer, as were the extortion receipts in *Rutkin*, the Court concluded that such receipts were taxable.

"We would do violence to the plain meaning of the statute and restrict a clear legislative attempt to bring the taxing power to bear upon *all receipts constitutionally taxable* were we to say that the payments in question here are not gross income."³⁴

From the broad language used in the *Glenshaw Glass* decision,

³¹ See *Penn Mut. Indem. Co.*, 32 T.C. 653 (1959), *aff'd*, 277 F.2d 16 (3d Cir. 1960), sustaining as constitutional the provision of the Internal Revenue Code of 1939 which imposed a tax on the gross premiums of mutual insurance companies without regard to underwriting losses. The tax was deemed a valid indirect tax. Thus, the meaning of sixteenth amendment "income" was considered irrelevant.

³² Brief for Commissioner, p. 11, *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955).

³³ 348 U.S. at 430. (Emphasis added.)

³⁴ *Id.* at 432-33. (Emphasis added.)

it could be inferred that the Court had construed the disjunctive catchall clause in section 22(a) as reaching not only sixteenth amendment "income" as defined in *Macomber*, but also *all receipts* not subject to the "direct tax" limitation. Indeed, the Court in *Glenshaw Glass* indicated that while the *Macomber* definition of "income" served a "useful purpose" in "distinguishing gain from capital," it was "not meant to provide a touchstone to all future gross income questions."³⁵ Moreover, in *General Am. Investors Co. v. Commissioner*,³⁶ a companion case to *Glenshaw Glass*, the Court took occasion to reiterate its position, with respect to the taxability of "insider profits," as follows:

"The payments in controversy were neither capital contributions nor gifts. . . . There is no indication that Congress intended to exempt them from coverage. In accordance with the legislative design to reach *all gain constitutionally taxable unless specifically excluded*, we conclude that the petitioner is liable for the tax. . . ."³⁷

These decisions, interpreting section 22(a) of the 1939 Internal Revenue Code, unquestionably represented the Court's most sweeping declarations regarding the scope of the "gross income" provision.³⁸

When the Internal Revenue Code was overhauled in 1954, the disjunctive catchall clause of section 22(a) was discarded in favor of the streamlined "shotgun" clause now contained in section 61(a)—"gross income means all income from whatever source derived." It is thus necessary to determine whether the broad concepts of taxability enunciated by the Court in *Glenshaw Glass* and *General American Investors* were carried over into the streamlined "gross income" provision of the 1954 Code.

In this respect, it is significant to note the explanation provided in the Senate report accompanying the 1954 Code substitute for the earlier disjunctive clause.

³⁵ *Id.* at 431.

³⁶ *Id.* at 434.

³⁷ *Id.* at 436. (Emphasis added.) Contrast this with the situation which existed under earlier income tax acts, when it was not even thought necessary to include a specific provision in the statute excluding legacies and testamentary gifts from income tax. Indeed, the Treasury itself expressed the view in early regulations that legacies and testamentary gifts were not income. See Wright, *The Effect of the Source of Realized Benefits Upon the Supreme Court's Concept of Taxable Receipts*, 8 STAN. L. REV. 164, 171 (1956).

³⁸ Although the language in these opinions was far-reaching, it should be made clear that no question of "severance" or "dominion" arose in either case, and there unquestionably was a "gain" realized by the taxpayer in each instance. For a thorough discussion of this entire area, through the decisions in *Glenshaw Glass* and *General American Investors*, see Wright, *supra* note 37.

"This section [61(a)] corresponds to section 22(a) of the 1939 Code. While the language in existing section 22(a) has been simplified, the all-inclusive nature of statutory gross income has not been affected thereby. Section 61(a) is as broad in scope as section 22(a).

"Section 61(a) provides that gross income includes 'all income from whatever source derived.' This definition is based upon the sixteenth amendment and the word 'income' is used as in section 22(a) in its constitutional sense. It is not intended to change the concept of income that obtains under section 22(a)."³⁹

The House report's explanation of the meaning of section 61(a) was in virtually identical terms, except for the omission of the final sentence contained in the Senate report.⁴⁰ On the basis of this legislative history, as well as the language of section 61(a) itself, it appears fairly clear that Congress intended to equate statutory "gross income" under the 1954 Code with the concept of "income" embodied in the sixteenth amendment. Accordingly, in order for the Court to continue to apply its broad philosophy of taxability as enunciated in *Glenshaw Glass*, it seemingly must read its concept of "gross income" into the sixteenth amendment. It can no longer rely on the phrase "gains . . . derived from any source whatever" to support its conclusion.

Interestingly enough, the Court may have anticipated this problem in *Glenshaw Glass*, in view of its casual statement there that "the definition of gross income has been simplified [in the 1954 Code], but no effect upon its present broad scope was intended."⁴¹

The Court thus far has decided only two cases arising under section 61(a) of the 1954 Code, *United States v. Kaiser*⁴² and the *James* case. Not surprisingly, both decisions make it clear that the Court intends to read the "shotgun" clause of section 61(a) as encompassing all that its predecessors reached.

The *Kaiser* case involved the taxability of certain strike benefits, in the form of rent and food vouchers, received by striking workers during the famous Kohler strike in 1954. A jury had found that the strike benefits were "gifts," excludable from "gross income" under section 102(a) of the 1954 Code. The trial judge set aside the jury verdict, but the court of appeals reinstated it.

³⁹ S. REP. NO. 1622, 83d Cong., 2d Sess. 168 (1954).

⁴⁰ H.R. REP. NO. 1337, 83d Cong., 2d Sess. A18 (1954).

⁴¹ 348 U.S. at 432.

⁴² 363 U.S. 299 (1960).

Before the Supreme Court the taxpayer argued that such benefits were not taxable, contending that even under the rationale of *Glenshaw Glass*, receipts did not constitute "income" without an element of profit or gain which, he asserted, was lacking in the case of strike benefits. He relied on a series of Treasury rulings holding non-taxable various types of assistance payments received by taxpayers, and reasoned, on the basis of these rulings, that "subsistence strike relief benefits fall within the category of alleviative receipts—a category lacking the quantity of *enrichment* to the recipient which appears to be a necessary ingredient of the concept of 'gains, profits or income.'"⁴³ In the alternative, the taxpayer contended that the strike benefits were, as found by the jury, "gifts" excludable from gross income under section 102(a). The United States took the position that, in light of *Glenshaw Glass*, "the only 'gross income' question is whether there has been a realized gain; if so, it is taxable unless excluded by one of the express exemptions."⁴⁴ It asserted that the taxpayer had clearly enjoyed a realized gain upon receipt of the strike benefits, a gain which could not properly be classified as an excludable "gift." Finally, the United States contended that even the *Macomber* definition of "income" had been satisfied, since the strike benefits represented gain derived from refraining from labor.

Four members of the Court in *Kaiser* concluded that the evidence was sufficient to support the jury's determination that the strike benefits were "gifts," and found it unnecessary to decide the "income" question.⁴⁵ Mr. Justice Frankfurter, speaking for himself and Mr. Justice Clark, considered the "income" question

⁴³ Brief for Taxpayer, pp. 27-28, *United States v. Kaiser*, 363 U.S. 299 (1960).

⁴⁴ Brief for United States, p. 40, *United States v. Kaiser*, *supra* note 43. The United States did indicate, however, that the Commissioner of Internal Revenue would not likely press the constitutional argument in *Glenshaw Glass* to its logical extreme. It referred to Rev. Rul. 59-58, 1959-1 CUM. BULL. 17, which held the value of turkeys, hams and other merchandise of nominal value distributed to employees at Christmas or other comparable holidays to be non-taxable, and indicated that this ruling represented "a recognition that it is neither feasible as an administrative matter nor a reasonable burden to impose on taxpayers to require every non-monetary receipt, however nominal, to be accounted for." While *Glenshaw Glass* was said to have put an end "to metaphysical disputes over the 'nature' and 'sources' of income," it was also viewed as not precluding "such a recognition of the practical necessity of limiting the reach of 61(a) to 'significant' transactions and not overburdening the tax system with accounting for *de minimis* receipts of benefits in kind." Brief for United States, p. 5, *United States v. Kaiser*, *supra*. This explanation of Rev. Rul. 59-58 counteracts any argument which might be made that such a ruling limits the breadth of § 61(a).

⁴⁵ Mr. Justice Brennan, joined by Mr. Chief Justice Warren and Justices Black and Douglas, relied on the companion case of *Commissioner v. Duberstein*, 363 U.S. 278 (1960), to support the conclusion that whether the strike benefits were "gifts" was a question for the jury to decide.

on its merits and went to great lengths to undercut the taxpayer's reliance on the Treasury rulings holding various types of assistance payments non-taxable.⁴⁶ After rejecting the taxpayer's "alleviative receipts" argument, Mr. Justice Frankfurter expressed the view that strike benefits fell within the statutory concept of "gross income," but concluded that the peculiar circumstances of the case supported the jury's verdict. He and Mr. Justice Clark thus supplied the necessary votes to dispose of the case on the ground that the strike benefits were "gifts," excludable from gross income under section 102(a). Mr. Justice Whittaker, dissenting along with Justices Harlan and Stewart, relegated the "income" question to a footnote. In his view, strike benefits were taxable on the following ground:

"Strike benefits constitute realized *gains* to their recipients, as a partial substitute for lost wages rather than lost capital, and are materially different in nature from the various categories of realized gains which have been treated as non-taxable through administrative fiat. . . . Strike benefits are, therefore, within the reach of the 'gross income' provision of the Code. See *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 429-30."⁴⁷

Mr. Justice Whittaker also argued in dissent that strike benefits, as a matter of law, were not excludable gifts.

Thus, five Justices in *Kaiser* (Frankfurter, Clark, Whittaker, Harlan and Stewart) considered the question whether strike benefits constitute "gross income" and all five agreed that such benefits were within the scope of section 61(a). Yet the significance of this aspect of the *Kaiser* decision is somewhat limited in view of the recent changes in Court personnel⁴⁸ and the fact that the other four members of the Court declined to consider the issue.

Consequently, it remained for the *James* case to be the first in which the full Court considered the scope and application of

⁴⁶ Mr. Justice Frankfurter pointed out that most of the rulings relied on by the taxpayer dealt with payments which either constituted a gift or represented compensation for the loss of an item which would not itself have been considered income. The rulings which held non-taxable certain federal welfare payments were considered readily distinguishable from a situation involving payments made under a private arrangement. See his concurring opinion, 363 U.S. at 305.

⁴⁷ 363 U.S. at 328 n.2 (dissenting opinion). Mr. Justice Whittaker's approach to the question appears to be precisely the approach taken by the Court in *Glenshaw Glass* and *General American Investors*, under the disjunctive § 22(a) of the 1939 Code.

⁴⁸ Both Mr. Justice Whittaker and Mr. Justice Frankfurter have since retired from the Court, and have been replaced by Mr. Justice White and Mr. Justice Goldberg, respectively. Any discussion at this time of the philosophy of the new Justices with respect to matters of federal income taxation would involve pure speculation.

the "gross income" provision of the 1954 Code. In fact, since *James* involved the taxable years 1951-1954, the Court was required to determine whether embezzled funds were within the reach of both the disjunctive clause of section 22(a) of the 1939 Code and its streamlined successor, section 61(a). Although not unexpectedly, in light of the legislative history of section 61(a) and the Court's comment in *Glenshaw Glass*, the taxpayer in *James* made no contention that a different standard was to be applied in determining the taxability of embezzled funds under the two provisions. The United States considered the point of enough significance to warrant a terse footnote in its brief, which stated: "As the Court noted in *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, the simplification of the language in the gross income definition of the 1954 Code [§ 61(a)] was not intended to affect its scope."⁴⁹

Mr. Chief Justice Warren's opinion in *James*, joined on this point by five others, reviewed the history of the *Wilcox* and *Rutkin* cases, and concluded that the reasoning of the *Rutkin* decision, holding extorted funds taxable under section 22(a), had "thoroughly devitalized" and "effectively vitiated" the prior *Wilcox* decision. *Wilcox* was accordingly overruled, and embezzled funds were held to be within the reach of both section 22(a) and section 61(a). To make it clear that the change in statutory language in 1954 had no effect upon the Court's approach to "gross income" questions, Mr. Chief Justice Warren's opinion referred to the two provisions almost interchangeably.

"And the Court has given a liberal construction to the broad phraseology of the 'gross income' definition statutes in recognition of the intention of Congress to tax all gains except those specifically exempted. . . . The language of § 22(a) of the 1939 Code, 'gains or profits and income derived from any source whatever,' and the more simplified language of § 61(a) of the 1954 Code, 'all income from whatever source derived,' have been held to encompass all 'accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.'"⁵⁰

This statement convincingly establishes the Court's readiness to read into section 61(a) the broad concept of "gross income" it had previously enunciated in *Glenshaw Glass*. Indeed, since the sweeping statements which had been made by the Court in

⁴⁹ Brief for United States, p. 14, *James v. United States*, 366 U.S. 213 (1961).

⁵⁰ 366 U.S. at 219.

some of its more recent decisions had laid considerable groundwork for the holding in *James*, the only unusual aspect of the decision in this respect was the formulation by Mr. Chief Justice Warren of an additional test for taxability.

“When a taxpayer acquires earnings, lawfully or unlawfully, without the consensual recognition, express or implied, of an obligation to repay and without restriction as to their disposition, ‘he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent.’ *North American Oil v. Burnet* This standard brings wrongful appropriations within the broad sweep of ‘gross income’; it excludes loans.”⁵¹

Apparently the Court felt that such a test was necessary to support the distinction which it drew between funds acquired through embezzlement and a bona fide loan, though the dissenting opinions of Justices Black and Whittaker vigorously argued that the distinction was fallacious and the test meaningless.⁵² But despite Mr. Justice Black’s urging that broad general standards of taxability should not be accepted as “universal panaceas” designed

⁵¹ *Ibid.* The Court’s language appears to be an improvised version of the so-called “claim of right” test originally set forth in *North Am. Oil v. Burnet*, 286 U.S. 417, 424 (1932), which involved the question of *when* particular receipts, which were admittedly income, were subject to tax. It will be recalled that the majority opinion in *Wilcox* emphasized the absence of a bona fide “claim of right” to embezzled funds in support of its conclusion on the question *whether* such funds could be subjected to tax. In *James*, the United States asserted that the “claim of right” test was applicable only in determining *when* particular receipts were taxable, and that use of the test in *Wilcox* was erroneous. Mr. Chief Justice Warren declined to resolve this question, stating: “In view of our reasoning set forth below, we need not pass on this contention. The use to which we put the claim of right test here is only to demonstrate that, whatever its validity as a test of *whether* certain receipts constitute income, it calls for no distinction between *Wilcox* and *Rutkin*.” 366 U.S. at 216 n.7. In light of this statement, the similarity between the test formulated by the Chief Justice in *James* and the “claim of right” test as originally enunciated in *North American Oil* is somewhat surprising. Mr. Justice Whittaker, in his dissent, agreed with the United States that the “claim of right” test applied only in determining *when* particular receipts were subject to tax. 366 U.S. at 256-57. See also note 52 *infra*.

⁵² For example, Mr. Justice Whittaker termed the test a “novel formula” with “no support in our prior decisions.” He also asserted that embezzled funds were in no sense “earnings,” stating that such funds “constitute the principal of a debt,” since an embezzler “is indebted to his victim in the full amount taken as surely as if he had left a signed promissory note at the scene of the crime.” Finally, Mr. Justice Whittaker contended that “the law readily implies whatever ‘consensual recognition’ is needed” to impose upon the embezzler an obligation to repay his victim. “By substituting this meaningless abstraction in place of the omitted portion of the *North American Oil* test of *when* a receipt constitutes taxable income, the prevailing opinion today goes far beyond overruling *Wilcox*—it reduces a substantial body of tax law into uncertainty and confusion.” 366 U.S. at 251, 257 (dissenting opinion).

to solve *all* gross income questions,⁵³ the direction in which the Court has pointed in *James* indicates rather clearly that just such an approach is likely to be taken in future cases arising under section 61(a).

II. DOUBLE TAXATION AND FEDERAL TAX LIENS

The Court's decision in *James*—that embezzled funds are includible in the embezzler's gross income in the year of misappropriation—once again revived the problem of so-called "double taxation." Prior to *James*, the basic interrelated tax effects of an embezzlement upon the victim were clear. If the funds which were taken had previously been reported by him as income, the embezzlement gave rise to a deductible loss.⁵⁴ To the extent that the loss deduction provided the victim with a "tax benefit," any amounts which were subsequently recovered constituted taxable income in the year of recovery.⁵⁵ Although the victim was merely regaining money which had rightfully belonged to him all along, the prior "tax benefit" theoretically justified the tax levied on the recovered funds.

With *James* holding that embezzled funds constitute taxable income to the embezzler in the year of misappropriation, the possibility now exists that the Government may get a share of the funds ahead of the victim. Mr. Justice Black viewed the Court's holding as thus imposing a "double tax" on the victim, in the form of a "property or excise tax on the rightful owner's embezzled funds, for which the owner has already once paid income tax when he rightfully acquired them."⁵⁶ To him this suggested that "a serious question of confiscation in violation of the Fifth Amendment"⁵⁷ might be raised.

While the same embezzled funds may now be subjected to a tax at three possible stages—at the time of initial acquisition by

⁵³ 366 U.S. at 235 (dissenting opinion).

⁵⁴ See Treas. Reg. § 1.165-8(a) (1960), which authorizes a loss deduction in the year the loss is discovered, except to the extent that there exists in that year a claim for reimbursement with respect to which there is a reasonable prospect of recovery. In *Alsop v. Commissioner*, 290 F.2d 726 (2d Cir. 1961), it was held that a cash basis taxpayer was not entitled to a loss deduction resulting from the embezzlement of funds by her agent before the taxpayer had received the funds and reported them as income. The *Alsop* case thus is illustrative of situations in which the embezzlement victim may not pay a tax on the funds in question prior to their misappropriation.

⁵⁵ See, e.g., *South Dakota Concrete Prods. Co.*, 26 B.T.A. 1429 (1932). See also Treas. Reg. § 1.165-1(d)(2)(iii) (1960). The majority in *James* indicated that the embezzler would be entitled to a deduction for the amount which he repays to the victim.

⁵⁶ 366 U.S. at 220.

⁵⁷ 366 U.S. at 228 (dissenting opinion).

⁵⁸ *Id.* at 229.

the owner,⁵⁸ at the time of embezzlement and at the time of recovery by the owner, if he previously claimed a loss deduction which yielded tax benefits—the argument that a tax exacted at the embezzlement stage might result in “confiscation” of the owner’s property in violation of the fifth amendment appears questionable. The tax in question is an income tax levied against the embezzler, not a tax levied on the particular funds acquired. The embezzler is free to satisfy his tax liability from any source whatever. Although he may use the embezzled funds themselves to pay all or part of the tax, such action provides no basis for sustaining a claim that the *Government* has “taken” the victim’s property within the meaning of the fifth amendment.

To substantiate his position, however, Mr. Justice Black expressed the view that:

“ . . . with the strong lien provisions of the federal income tax law an owner of stolen funds would have a very rocky road to travel before he got back, without paying a good slice to the Federal Government, such funds as an embezzler who had not paid the tax might, perchance, not have dissipated.”⁵⁹

Mr. Justice Whittaker argued along the same lines, though he did not go so far as to suggest a question of “confiscation.” It was his view that, in overruling *Wilcox*, the Court had adopted a rule which would inflict manifest injury upon the embezzlement victim by permitting a federal tax lien to be asserted and enforced against the embezzled funds ahead of the victim’s claim for recovery.⁶⁰

It is true that holding an embezzler liable for the payment of an income tax on misappropriated funds may well diminish the victim’s prospects of obtaining a full recovery. But it would appear inaccurate to contend that the victim’s right of recovery will be affected by the attachment of a superior federal tax lien *on the embezzled funds*. The Code provides that a federal tax lien attaches to “all property and rights to property . . . belonging to” a delinquent taxpayer.⁶¹ In *Aquilino v. United States*,⁶² decided just one year prior to *James*, the Court held that the tax-

⁵⁸ This would not be true, of course, in situations such as that presented in *Alsop v. Commissioner*, 290 F.2d 726 (2d Cir. 1961), in which the victim’s agent misappropriates the funds before the victim has received them and reported them as income.

⁵⁹ 366 U.S. at 229 (dissenting opinion).

⁶⁰ *Id.* at 252.

⁶¹ INT. REV. CODE OF 1954, § 6321.

⁶² 363 U.S. 509 (1960). See also *United States v. Durham Lumber Co.*, 363 U.S. 522 (1960); *United States v. Bess*, 357 U.S. 51 (1958).

payer's "property and rights to property" against which a federal tax lien attaches were to be determined under state law. There can be no doubt, under state law, that an embezzler has no right, title or interest in the funds which he misappropriates—the funds continue to be the property of the victim. Thus, under the *Aquilino* rule a federal tax lien would *not* attach to embezzled funds traceable into the hands of the embezzler, and the victim's right to recover the funds would *not* be defeated by a claim of Government priority to them.⁶³

It seems clear, therefore, that the majority in *James* could have used the *Aquilino* decision as a direct response to the dissenters' arguments regarding the effects of a tax lien on embezzled funds. Yet, for one reason or another, the majority chose to by-pass the issue entirely. The only questions directly involved in *James*, of course, were the taxability of embezzled funds and the embezzler's criminal liability for failing to report such funds, and thus the matter of enforcement could quite properly be left open. But it is interesting to speculate on whether the majority's failure to deal with the tax lien issue represented merely a traditional exercise of judicial restraint, or, rather, a calculated effort to avoid a more vigorous challenge on the merits. For it is at least possible that reference by the majority to the *Aquilino* decision might have brought forth an even stronger line of attack by the dissenters.

A declaration that the *Aquilino* rule would prevent a lien from attaching to embezzled funds might have substantially weakened the thrust of Mr. Chief Justice Warren's statement in *James* that, for purposes of federal income taxation, "it is inconsequential that an embezzler may lack title to the sums he appropriates while an extortionist may gain a voidable title."⁶⁴ If the *Aquilino* rule is applicable, the difference between a voidable title and a lack of title is far from "inconsequential" as a practical matter. If under *Aquilino* a lien cannot attach to embezzled funds, then although an embezzler is subject to tax on the funds he acquires, the very funds which give rise to his tax liability are not within

⁶³ Although the question of priority of competing tax liens is a matter of federal law, that question is not presented until it is established under state law that the federal lien has in fact attached to "property" or "rights to property" belonging to the taxpayer. See cases cited note 62 *supra*. Cf. *State v. Byrne*, 54-2 U.S. Tax Cas. ¶ 9571 (Wash. Super. Ct.), holding that a federal tax lien did not attach to funds acquired through fraudulent misrepresentation, trick and device which amounted to grand larceny, on the ground that the taxpayer did not acquire any right, title or interest in the funds. See generally PLUMB & WRIGHT, *FEDERAL TAX LIENS* 119-20 (ALI Monograph 1961). See also the dissenting opinion of Mr. Justice Burton in *Commissioner v. Wilcox*, 327 U.S. 404, 414 (1946).

⁶⁴ 366 U.S. at 216.

reach of the provisions governing enforcement of that liability. Yet the extortioner's voidable title would undoubtedly be sufficient to subject his illegally obtained funds to a federal tax lien, and thus the distinction between the embezzlement and extortion cases is somewhat sharpened. Moreover, a similar distinction exists between embezzled funds and other types of "unlawful gains" which have been held taxable (such as protection payments to racketeers, ransom payments, bribes, grafts, black market gains and book-making income)⁶⁵ and which the majority referred to in support of its view that Congress intended to tax all unlawful gains. As is true with respect to extortion payments, title to funds thus obtained passes to the recipient and the funds would be subject to a federal tax lien in his hands.

To be sure, different considerations are involved in determining whether Congress has made particular receipts the subject of a tax rather than the subject of a lien, and it is not suggested that resolution of the question of tax liability should turn on the rules relating to enforcement. But the fact that the majority chose to leave the question open, despite the apparent applicability of the *Aquilino* rule, suggests that some concern may have existed as to the resulting lack of correlation between liability and enforcement if the *Aquilino* rule is applied in the embezzlement setting.⁶⁶ Indeed, since the dissenters argued as they did notwithstanding the *Aquilino* precedent, it may be that they simply assumed that the Court would not extend the "gross income" provision to funds in which the taxpayer had no legal interest whatsoever, without also being prepared to extend the lien provisions accordingly. They may well have believed that a necessary concomitant to the taxation of embezzled funds would be the amenability of such funds to a federal tax lien.

In any event, the tax lien question leaves the Court in a delicate position. If *Aquilino* is to be applied, the Court would raise doubts about its decision in *James* by in effect attributing to Congress an intention to tax funds acquired by the taxpayer as to which no enforcement provisions would be applicable. On the other hand, if a lien is allowed to attach under present statutes,

⁶⁵ See cases cited in *Rutkin v. United States*, 343 U.S. 130, 137 n.8 (1952), and referred to by the Court in *James*, 366 U.S. at 218.

⁶⁶ Correlation between tax liability and the tax lien provisions is by no means otherwise perfect. In the Clifford-trust situation, for example, the grantor is taxed on the income of the trust even though he does not receive it. Similarly, in the "assignment of income" situation, the assignor is taxed on the income which he earns, although he does not receive it. But those are not situations in which tax liability is based on the acquisition of funds which cannot be subjected to a tax lien.

the Court would be forced to repudiate its recent declarations in this area. With *James* now resolving the matter of an embezzler's tax liability, the related problem of enforcement is likely to cause the tax gatherers some concern. And although the question of enforcement was not directly involved in *James*, the Court's silence on the problem may well indicate that the appropriate solution is by no means clear.

III. OVERRULING A STATUTORY PRECEDENT

The fact that in *James* the Supreme Court unhesitatingly overruled one of its prior decisions should have come as no surprise. Indeed, on the closing day of its 1960 Term, the Court overruled a twelve-year-old constitutional precedent in a criminal case although the party who benefited from the overruling had not even urged the point.⁶⁷ It is now generally accepted, of course, that in constitutional matters the doctrine of stare decisis has, at most, but limited vitality and must give way to the "dynamic component of history."⁶⁸ However, where the construction of a statute is involved, as in *James*, the considerations are somewhat different.

If the Court, in a prior decision, has misconstrued a particular statutory provision, corrective action might be anticipated through legislative response to the erroneous interpretation. Particularly would this seem true in cases involving the interpretation of federal tax statutes, for congressional committees are continuously engaged in reviewing the existing tax laws, and tax legislation of varying scope and importance is generally enacted in each session of Congress. Moreover, Congress quite frequently has acted in direct response to Supreme Court decisions interpreting tax statutes,⁶⁹ and it once erased a line of Court decisions construing an estate tax provision by adopting an amendatory joint resolution within one day after the Court had handed down three opinions reaffirming its previously announced construction of the pertinent section of the statute.⁷⁰

⁶⁷ *Mapp v. Ohio*, 367 U.S. 643 (1961), overruling *Wolf v. Colorado*, 338 U.S. 25 (1949).

⁶⁸ Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 737 (1949). See generally Blaustein & Field, "Overruling" Opinions in the Supreme Court, 57 MICH. L. REV. 151 (1958).

⁶⁹ See instances cited by Mr. Justice Black in his dissenting opinion in *James*, 366 U.S. at 231 n.13. More recently, Congress has enacted legislation which had the effect of modifying decisions by the Court in *United States v. Cannelton Sewer Pipe Co.*, 364 U.S. 76 (1960) [75 Stat. 674, 26 U.S.C. § 613 (Supp. III, 1961), allowing taxpayers an election in computing depletion allowances on certain types of mineral products], and *American Automobile Ass'n v. United States*, 367 U.S. 687 (1961) [75 Stat. 222, 26 U.S.C. § 443 (Supp. III, 1961), adding § 456 to INT. REV. CODE OF 1954].

⁷⁰ 46 Stat. 1516, amending § 302(c) of the Revenue Act of 1926, was enacted into law on March 3, 1931, the day following the decisions of the Supreme Court in *Burnet v. Northern Trust Co.*, 283 U.S. 782 (1931), *Morsman v. Burnet*, 283 U.S. 783 (1931), and

Accordingly, when the correctness of its prior interpretation of a particular statutory provision is challenged, one of the problems confronting the Court is the significance which it must give to congressional reaction to the earlier decision. Should the failure of Congress to pass corrective legislation be regarded as tantamount to an acquiescence in the prior decision? Or should the Court adhere to its right to correct what it considers to be an error of its own making, without regard to congressional silence? How should the Court evaluate the extent to which Congress may have considered the matter before choosing not to act? Should re-enactment of the provision without adoption of a corrective amendment be deemed conclusive, or even persuasive, evidence of congressional acceptance of the earlier decision? Questions of this type would seem to pose serious problems for the Court, but the manner in which they were handled in the *James* case indicates that such problems may be largely academic.

In *James*, the United States urged that *Wilcox* should be overruled on the ground that it represented a misconstruction of the "gross income" provision of the Code. The taxpayer, on the other hand, argued that *Wilcox* should be followed for the reason that it was properly decided, and moreover, that if Congress had considered the decision erroneous it would have legislated a change in the statute.

What was the nature of the congressional response to the *Wilcox* decision with which the Court was confronted in *James*? There were no immediate proposals for corrective legislation introduced in Congress following that decision. In fact, instead of seeking a change in the Code, the Treasury issued a General Counsel's Memorandum adopting the rationale of the *Wilcox* decision and modifying its own previously announced rule on the question.⁷¹ In 1954, when the Internal Revenue Code was overhauled, the "gross income" provision was re-enacted in streamlined form without any change specifically designed to alter the effect of the *Wilcox* case.⁷² Thereafter, in 1959 and 1961, bills were introduced in the House for the purpose of subjecting embezzled funds to taxation, but neither was reported out of committee.⁷³

McCormick v. Burnet, 283 U.S. 784 (1931), which cases reaffirmed the Court's prior decision in *May v. Heiner*, 281 U.S. 238 (1930).

⁷¹ G.C.M. 24945, 1946-2 CUM. BULL. 27, modifying G.C.M. 16572, XV-1 CUM. BULL. 82 (1936).

⁷² INT. REV. CODE OF 1954, § 61(a), re-enacting Int. Rev. Code of 1939, § 22(a), 53 Stat. 9. See S. REP. NO. 1622, 83d Cong., 2d Sess. 168 (1954).

⁷³ H.R. REP. NO. 8854, 86th Cong., 1st Sess. (1959); H.R. REP. NO. 312, 87th Cong., 1st Sess. (1961).

Yet, despite the fact that Congress had not been prompted to take any corrective action immediately following the *Wilcox* decision and also had bypassed several subsequent opportunities to legislate a change in the Code, six members of the Court in *James* flatly rejected the taxpayer's argument that such a showing of congressional inaction required adherence to the *Wilcox* case.

"But the fact that Congress has remained silent or has re-enacted a statute which we have construed, or that congressional attempts to amend a rule announced by this Court have failed, does not necessarily debar us from re-examining and correcting the Court's own errors. *Girouard v. United States*, 328 U.S. 61, 69-70; *Helvering v. Hallock*, 309 U.S. 106, 119-122. There may have been any number of reasons why Congress acted as it did."⁷⁴

Since Mr. Justice Black, joined by Mr. Justice Douglas, strongly urged in dissent that congressional failure to alter the *Wilcox* rule required that the decision be followed, the terse statement made by the majority in support of the Court's right to correct its own errors prompts an inquiry as to whether *James* represents a significant change in the Court's attitude regarding questions of this nature.

Prior to the *James* decision, *Helvering v. Hallock*⁷⁵ and *Commissioner v. Estate of Church*⁷⁶ were the only cases involving interpretations of the federal tax laws which resulted in the overruling of earlier decisions. In *Hallock* the question before the Court was whether a transfer of property, under which the transferor held a possibility of reverter until his death, was subject to federal estate tax on his death under the provision taxing transfers "intended to take effect in possession or enjoyment at or after [the transferor's] death."⁷⁷ In 1931 the Court had held such a transfer subject to the estate tax in *Klein v. United States*.⁷⁸ But in the two *St. Louis Trust* cases⁷⁹ decided four years later, the Court had distinguished *Klein* and ruled that quite similar transfers were outside the reach of the provision in question. One of the arguments pressed by the taxpayer in *Hallock* was that holding the property so transferred to be includible in the decedent's gross

⁷⁴ 366 U.S. 213, 220 (1961).

⁷⁵ 309 U.S. 106 (1940).

⁷⁶ 335 U.S. 632 (1949).

⁷⁷ Revenue Act of 1926, ch. 27, § 302(c), 44 Stat. 70.

⁷⁸ 283 U.S. 231 (1931).

⁷⁹ *Helvering v. St. Louis Trust Co.*, 296 U.S. 39 (1935); *Becker v. St. Louis Trust Co.*, 296 U.S. 48 (1935).

estate would require an overruling of the *St. Louis Trust* cases, which, it was urged, should be regarded as proper interpretations of the estate tax laws since Congress had not seen fit to amend the provision in question following those decisions. This argument was persuasive only to two members of the Court, and was resoundingly rejected by Mr. Justice Frankfurter, speaking for a majority of six which also included Justices Black and Douglas.

Mr. Justice Frankfurter made it clear that *stare decisis* was not a "mechanical formula of adherence to the latest decision"⁸⁰ under all circumstances, and would not be applied where the result would be contrary to sounder doctrine previously considered by the Court. The mere failure of Congress to legislate following a particular decision interpreting a tax statute did not, without more, prevent the Court from re-examining its prior decision. It was pointed out that there might have been any number of reasons why Congress did not act, and the Court refused to speculate regarding the actual basis for such inaction.

"It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines. To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities."⁸¹

Mr. Justice Frankfurter's comments made it clear that there may well be instances when congressional inaction would require adherence to a prior decision, but that *Hallock* was simply not such a case. To sustain his conclusion, Mr. Justice Frankfurter noted that there was no indication that the attention of Congress had been directed to the *St. Louis Trust* cases, "even by any bill that found its way into a committee pigeon-hole."⁸² The fact that Congress had legislated in response to other Court decisions, including a case decided the same day as the *St. Louis Trust* cases but involving a different provision of the estate tax laws,⁸³ was considered irrelevant on the ground that "the fact of Congressional action in dealing with one problem while silent on the different problems created by the *St. Louis Trust* cases, does not imply controlling acceptance by Congress of those cases."⁸⁴ The so-called "re-enactment" rule, to the effect that re-enactment of a

⁸⁰ 309 U.S. at 119.

⁸¹ *Id.* at 119-20.

⁸² *Id.* at 120.

⁸³ *White v. Poor*, 296 U.S. 98 (1935), construing § 302(d) of the Revenue Act of 1926. Congress enacted amendatory legislation on June 22, 1936, found at 49 Stat. 1744.

⁸⁴ 309 U.S. at 120 n.7.

statute adopts outstanding administrative and judicial constructions of the provision being re-enacted, was dismissed as inapplicable on the ground that a technical re-enactment of the provision in question had never taken place. And to add a finishing touch, Mr. Justice Frankfurter observed that "we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."⁸⁵ The *St. Louis Trust* cases were overruled.

Commissioner v. Estate of Church, the other "overruling" tax decision prior to *James*, involved the question whether a transfer of property in trust with a reserved life estate was subject to federal estate tax on the transferor's death under the same "intended to take effect in possession or enjoyment" provision involved in *Hallock*. The Court had previously considered the same issue in *May v. Heiner*,⁸⁶ and had ruled that such a transfer was not encompassed by the statutory language. The Treasury, though disturbed by the decision in *May v. Heiner*, chose not to seek corrective legislation immediately. On March 2, 1931, less than a year later, the Court handed down three per curiam opinions which adhered to the rule of *May v. Heiner*, and the following day the Treasury requested that Congress amend the statute to change the rule of *May v. Heiner* and its successors.⁸⁷ On that same day the Treasury's proposed resolution was adopted by Congress and signed into law.⁸⁸ In 1938 the Court had occasion to consider the provision as it had been amended, and, after a careful reading of the pertinent legislative history, concluded that the resolution was not intended to be applied retroactively to transfers made prior to the date of its enactment.⁸⁹

Since the transfer under consideration in the *Church* case had been made in 1924, it was strenuously argued by the taxpayer that *May v. Heiner* should be followed by the Court, both by reason of stare decisis and on the ground that Congress had impliedly accepted that decision with respect to pre-March 4, 1931 transfers by choosing to legislate prospectively only and by re-enacting the provision with its prospective amendment as part of the Revenue Act of 1932.

But the Court, speaking through Mr. Justice Black, ruled otherwise. It rejected the stare decisis argument on the authority of

⁸⁵ *Id.* at 121.

⁸⁶ 281 U.S. 238 (1930).

⁸⁷ See note 70 *supra*.

⁸⁸ *Ibid.*

⁸⁹ *Hassett v. Welch*, 303 U.S. 303 (1938).

the *Hallock* case and, again relying on *Hallock*, refused to agree with the taxpayer's contention that in making the joint resolution prospective in application Congress intended to accept and ratify so questionable a decision as *May v. Heiner*. The Court stated that *May* and *Hallock* were irreconcilable in theory, and held that under *Hallock* the transfer was subject to the estate tax, thereby overruling *May v. Heiner*.

Mr. Justice Black's opinion in *Church* brought forth a vigorous dissent from Mr. Justice Frankfurter, author of the *Hallock* opinion. At the outset Frankfurter stated that the result which the Court had reached was "a result the upsetting of which by Congress is almost invited."⁹⁰ After discussing the history of the *May v. Heiner* line of cases, Mr. Justice Frankfurter set forth his view regarding the significance to be afforded congressional reaction to a prior decision as follows:

"It is one thing to hold that Congress is not charged either with seeking out and reading decisions which reach conflicting views in the application of a sound principle or with taking steps to meet such decisions. This is the meaning of our holding in the *Hallock* case. It is quite a different thing to say that a statute does not acquire authoritative content when a decision interpreting it has been called to the attention of the public and of Congress and has engendered professional controversy, and when Congress, after full debate, has not merely refused to undo the effect of the decision but has seen fit to modify it only partially. . . . That is this case."⁹¹

This dissent evoked a pointed footnote by Black, asserting that Frankfurter's position was essentially the dissenting view of Mr. Justice Roberts in *Hallock*, which the Court (through Frankfurter) had then rejected.⁹² Subsequent events proved Mr. Justice Frankfurter correct, however, as Congress responded to the Court's decision in *Church* and its companion case of *Estate of Spiegel v. Commissioner*,⁹³ by enacting the Technical Changes Act of 1949, which had the effect, *inter alia*, of restoring the *May v. Heiner* interpretation of the statute in question to transfers made prior to March 4, 1931, by decedents dying before January 1, 1950.⁹⁴

As previously stated, the *Hallock* and *Church* cases represent the only "overruling" decisions involving the interpretation of fed-

⁹⁰ 335 U.S. at 667.

⁹¹ *Id.* at 683-84.

⁹² *Id.* at 650 n.11.

⁹³ 335 U.S. 701 (1949).

⁹⁴ Technical Changes Act of 1949, ch. 720, § 7(a), 63 Stat. 894.

eral tax statutes prior to the decision in *James*. In both cases, the Court felt free to overturn its earlier holdings despite the fact that Congress had taken no action which directly altered the results of the prior decisions. But *Hallock* and *Church* left unresolved the problem of determining the sort of showing by Congress which would convince the Court that a prior decision had in fact been considered by Congress to represent a proper declaration of legislative intent. Since they are the only tax cases which appear to have dealt directly with this matter,⁹⁵ it is necessary to examine several non-tax cases to obtain a further indication of the Court's attitude in this regard.

In *United States v. Elgin, J. & E. Ry.*,⁹⁶ the Court was called upon to interpret the commodities clause of the Interstate Commerce Act. The statute, so far as pertinent, made it unlawful for any railroad to transport any article or commodity manufactured or produced by it or under its authority, or in which it had a direct or indirect interest. The stock of the Elgin railroad was owned entirely by United States Steel Corporation, and sixty percent of the railroad's business consisted of the transportation of products manufactured by other wholly-owned subsidiaries of U.S. Steel. In 1915 the Court had ruled that the transportation by a railroad of coal belonging to a sister subsidiary did not necessarily violate the statute, absent a showing that the railroad was acting as an agent, instrumentality or department of the parent.⁹⁷ In the *Elgin* case, the Court refused to abandon its prior interpretation

⁹⁵ In *Helvering v. Griffiths*, 318 U.S. 371 (1943), the Court was asked to construe §§ 22(a) and 115(f)(1) of the 1939 Code as including within "dividends" constituting "gross income" a distribution to common stockholders of additional common stock. In *Eisner v. Macomber*, 252 U.S. 189 (1920), the Court had held that a distribution of common on common was not "income" within the meaning of the sixteenth amendment, and thus could not constitutionally be subjected to an income tax by Congress. In *Griffiths*, the Commissioner asserted that a distribution of common on common ought to be taxable income to the recipient, thus urging that *Eisner v. Macomber* be overruled. The Commissioner's argument was weakened by the fact that § 115(f)(1), on which he relied, provided that a distribution of stock "shall not be treated as a dividend to the extent that it does not constitute income to the shareholder within the meaning of the Sixteenth Amendment to the Constitution." By a vote of five to three, the Court refused to consider whether *Eisner v. Macomber* ought to be overruled, holding that the legislative history of the statute in question indicated that Congress did not seek to challenge the *Macomber* rule when it enacted § 115(f)(1). Mr. Justice Douglas, joined by Justices Black and Murphy, argued that Congress sought to reach as far as it could, and had no intention of foreclosing a challenge to *Eisner v. Macomber*. Since *Macomber* was a constitutional rather than a statutory interpretation case, the *Griffiths* case does not bear directly on the question of the type of congressional response which will persuade the Court that a prior decision was regarded by Congress as a proper declaration of legislative intent.

⁹⁶ 298 U.S. 492 (1936).

⁹⁷ *United States v. Delaware, L. & W.R.R.*, 238 U.S. 516 (1915).

of the statute. Since Congress had not seen fit to amend the provision following the 1915 decision, it was deemed proper to conclude that "the interpretation of the Act then accepted has legislative approval."⁹⁸ No indication was given of the extent to which Congress had considered the enactment of legislation on the point.

The same question of statutory interpretation was before the Court again, twelve years after the *Elgin* decision, in *United States v. South Buffalo Ry.*⁹⁹ By a five-to-four vote the Court adhered to its earlier interpretation of the statute and refused to overrule the *Elgin* case. Mr. Justice Jackson's majority opinion was devoted largely to an analysis of the legislative history of the Transportation Act of 1940, which had been enacted by Congress four years after the Court's *Elgin* decision. The original Senate bill introducing the act, as presented to the Senate Committee on Interstate Commerce, had contained a provision designed to alter the effect of the *Elgin* case. When the bill was reported to the Senate by the committee, however, the corrective provision had been deleted. Testimony at the committee hearings on the bill indicated that the committee had decided against the adoption of legislation which would have had the effect of overruling the *Elgin* decision. Under the circumstances, the majority in the *South Buffalo* case felt that the Court should not act where Congress had specifically considered the matter and had chosen not to act. The Court's decision in *South Buffalo* thus provides greater insight into the type of showing necessary to satisfy the Court that a prior decision has received congressional approval.

Application of the overtime provisions of the Fair Labor Standards Act to so-called "weekly guarantee" wage plans was involved in *Walling v. Halliburton Oil Well Cementing Co.*¹⁰⁰ In that case the Court was urged to overrule its prior decision in *Walling v. Belo Corp.*,¹⁰¹ which had upheld the validity of such plans. The *Belo* case had been decided by a five-to-four vote, and since that time the Court had acquired three new members. In *Halliburton* a majority of the Court chose to adhere to the *Belo* decision. In addition to expressing the view that *Belo* had been correctly decided, the majority referred to the fact that Congress had permitted the applicable provisions of the act to remain unchanged during the five years subsequent to the *Belo* decision.

⁹⁸ 298 U.S. at 500.

⁹⁹ 333 U.S. 771 (1948).

¹⁰⁰ 331 U.S. 17 (1947).

¹⁰¹ 316 U.S. 624 (1942).

As in the *Elgin* case, however, there was no indication as to whether Congress had even considered legislating in this area.

A line of decisions involving the oath of allegiance required of those seeking to become naturalized citizens sheds further light on the significance which the Court attaches to congressional reaction to a prior decision. In 1929 the Court had ruled, in *United States v. Schwimmer*,¹⁰² that the 1906 naturalization oath required the declaration by an alien of his willingness to take up arms for this country. Two days after the *Schwimmer* decision was announced, a bill was introduced in the House to overturn the result the Court had reached. Hearings were held on the bill, but no further action was taken. Two years later, the Court again considered the question, and followed its holding in the *Schwimmer* case in both *United States v. Macintosh*¹⁰³ and *United States v. Bland*.¹⁰⁴ Shortly thereafter, another bill was introduced in the House to amend the statute. Hearings were held but again no further action was taken. Other bills with the same design were presented in succeeding sessions of Congress, none of which was reported out of committee. In all, eight bills aimed at correcting the Court's decisions were introduced in Congress over a period of eleven years. When Congress finally acted in this area, through the passage of the Nationality Act of 1940, no material change was made with respect to the naturalization oath as it had been interpreted in the *Schwimmer*, *Macintosh* and *Bland* cases. Two years later, in 1942, Congress enacted the Second War Powers Act to relax the requirements for naturalization of aliens who served honorably as combatants or non-combatants in the armed forces during World War II, but again the naturalization oath remained intact.

In *Girouard v. United States*,¹⁰⁵ the question presented was whether the Nationality Act of 1940 permitted an alien to be naturalized despite his expressed unwillingness to take up arms for this country. The Court, dividing five to three, held that the 1940 Act permitted naturalization in such circumstances, thereby overruling the *Schwimmer*, *Macintosh* and *Bland* cases. The majority, speaking through Mr. Justice Douglas, rejected the Government's argument that the failure of Congress to enact any of the bills which had been introduced to correct the earlier decisions indi-

¹⁰² 279 U.S. 644 (1929).

¹⁰³ 283 U.S. 605 (1931).

¹⁰⁴ 283 U.S. 636 (1931).

¹⁰⁵ 328 U.S. 61 (1946).

cated that Congress had in effect adopted, as part of the 1940 Act, the interpretation placed on the statute by those cases. After referring to the *Hallock* case, Mr. Justice Douglas continued:

"It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law. We do not think under the circumstances of this legislative history that we can properly place on the shoulders of Congress the burden of the Court's own error. The history of the 1940 Act is at most equivocal. It contains no affirmative recognition of the rule of the *Schwimmer*, *Macintosh* and *Bland* cases. The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of those cases."¹⁰⁶

To this point, the *Girouard* case goes far toward disregarding what seems to have been a fairly clear indication of congressional satisfaction with the earlier cases. In the end, however, the Court appears to have rested its decision on the passage of the 1942 Second War Powers Act, which relaxed the naturalization requirements for non-combatant aliens. Mr. Justice Douglas stated that "the affirmative action taken by Congress in 1942 negatives any inference that otherwise might be drawn from its silence when it re-enacted the oath in 1940."¹⁰⁷

It is interesting to note that Mr. Chief Justice Stone, previously a dissenter in the *Schwimmer* line of cases, felt compelled to dissent in *Girouard* on the ground that in his view the pertinent legislative history made it clear that Congress had chosen to adopt the interpretation of the earlier cases.

In the antitrust field, the Court has taken a much more restrained view and paid greater deference to the silence of Congress. For example, a labor union's claim that Congress intended to exclude labor organizations and their activities entirely from the ambit of the Sherman Act was rejected by the Court in the leading case of *Apex Hosiery Co. v. Leader*.¹⁰⁸ After referring to several prior decisions which had held that labor unions and their activities were not entirely excluded from the scope of the Sherman Act,¹⁰⁹ Mr. Justice Stone, speaking for a majority of six, pointed out that while twelve bills had been introduced over a period of years to exempt unions completely from Sherman Act

¹⁰⁶ *Id.* at 69-70.

¹⁰⁷ *Id.* at 70.

¹⁰⁸ 310 U.S. 469 (1940).

¹⁰⁹ See *id.* at 487 n.6.

coverage, the most that Congress had seen fit to do was restrict the act's application with respect to various categories of union activity. Such action by Congress was felt to imply legislative acceptance of the Court's prior construction of the act.

In *Toolson v. New York Yankees, Inc.*,¹¹⁰ the Court adhered to its 1922 decision in the *Federal Baseball* case¹¹¹ and held that professional baseball was exempt from the federal antitrust laws. The per curiam opinion in *Toolson* observed that Congress had not seen fit to legislate in response to the prior decision, and stated that any change in the status of professional baseball should come through legislative channels rather than judicial decisions. Shortly thereafter, the Court held that professional boxing¹¹² and professional football¹¹³ were subject to the antitrust laws, notwithstanding *Toolson's* adherence to stare decisis with respect to baseball.¹¹⁴

From the foregoing, therefore, it seems justifiable to conclude that no valid generalizations can be made concerning the effects of congressional inaction on the Court's reconsideration of a prior decision involving the construction of a federal statute. On occasion, as in *Elgin, Halliburton* and *Toolson*, the Court has deferred to the legislative process and relied on congressional inaction as a basis for adhering to a prior decision, without mentioning the extent to which Congress had or had not contemplated corrective action. On the other hand, when the Court has been plainly dissatisfied with a prior decision and there is no indication that Congress has considered corrective legislation, as in *Hallock*, congressional silence has been deemed inconclusive and no basis for preventing an overruling. However, where it has been shown that amendatory legislation was introduced in Congress, and either ultimately rejected or partially enacted, the

¹¹⁰ 346 U.S. 356 (1953).

¹¹¹ *Federal Baseball Club v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922).

¹¹² *United States v. International Boxing Club*, 348 U.S. 236 (1955).

¹¹³ *Radovich v. National Football League*, 352 U.S. 445 (1957).

¹¹⁴ Mr. Justice Clark's comments for the Court in the *Radovich* case are particularly significant: "We, therefore, conclude that the orderly way to eliminate error or discrimination, if any there be, is by legislation and not by court decision. Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike. The whole scope of congressional action would be known long in advance and effective dates for the legislation could be set in the future without the injustices of retroactivity and surprise which might follow court action. Of course, the doctrine of *Toolson* and *Federal Baseball* must yield to any congressional action and continues only at its sufferance. This is not a new approach. See *Davis v. Department of Labor*, 317 U.S. 249, 255 (1942); compare *Ruthin v. United States*, 343 U.S. 130 (1952)." *Id.* at 452. See generally the concurring opinion of Mr. Justice Rutledge in *Cleveland v. United States*, 329 U.S. 14, 21 (1946).

Court has followed a devious path. In *South Buffalo* deletion of the corrective amendment was considered persuasive evidence of congressional acceptance of the prior decision. In *Apex Hosiery* failure to enact numerous proposed bills was deemed sufficient to indicate congressional approval of the prior decisions. On the other hand, in *Girouard* failure to enact numerous proposed bills was deemed inconclusive evidence of congressional intent, though the Court relied heavily on subsequent affirmative action to support its result. And in *Church* adoption of an amendment which Congress made prospective only was considered insufficient evidence of congressional acceptance of existing law prior to the effective date of the amendment.

Against this patchwork of decisions, it is not surprising to find the Court in *James* refusing to pay much attention either to the silence of Congress following the *Wilcox* decision or to the failure of two amendatory bills to be reported out of committee a number of years later. The Court had sufficient authority in *Hallock* and *Girouard* for asserting that its right to reconsider the question before it could not be precluded by a showing of such equivocal congressional reaction to the *Wilcox* decision.

But there was an additional factor which complicated the Court's treatment of this question in *James*. Since the taxable years involved were 1951 through 1954, both the 1939 and 1954 Internal Revenue Codes were applicable. As indicated, the "gross income" provision of the 1939 Code had been re-enacted in streamlined form in 1954 with no change in scope intended. The Court thus was presented with a situation calling for potential application of the so-called "re-enactment rule," to the effect that re-enactment by Congress of a particular statutory provision without pertinent change carries with it an adoption of existing administrative and judicial interpretations of the provision.

The "re-enactment rule" has run a varied course¹¹⁵ and has been the subject of considerable adverse criticism, primarily on the ground that it is extremely unrealistic to attribute to Congress an awareness and acceptance of the numerous administrative and judicial interpretations which may have been placed on a particular provision.¹¹⁶ Much of this criticism, however, was gen-

¹¹⁵ See, e.g., *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955) (not applying rule); *Morgan v. Commissioner*, 309 U.S. 78 (1940) (applying rule); *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110 (1939) (applying rule).

¹¹⁶ See generally Brown, *Regulations, Reenactment, and the Revenue Acts*, 54 HARV. L. REV. 377 (1941); Griswold, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 398 (1941); Paul, *Use and Abuse of Tax Regulations in Statutory Constructions*, 49 YALE L.J. 660 (1940).

erated at a time when it was the practice of Congress to re-enact the revenue laws every few years, without undertaking a thorough review of recent developments affecting each statutory provision. Departure from that practice has weakened the force of this criticism, particularly since the congressional committees charged with responsibility currently give close attention to significant administrative and judicial developments in the tax field.

Nevertheless, the rule's application to interpretative material in the form of administrative regulations or lower court decisions may be questioned on other grounds. Treasury regulations interpreting a particular provision are not binding and are subject to challenge in the courts. Lower court decisions interpreting the tax laws need not be followed by the Commissioner and may be reversed on appeal. The absence of finality which characterizes interpretative materials of this sort strongly supports a refusal to apply the rule where such authorities are involved.

But a decision of the Supreme Court is altogether different. It represents the ultimate, conclusive interpretation of a statutory provision, which cannot be altered except by the action of Congress or the Court itself. In view of the established fact that Congress frequently has acted in direct response to some of the Court's tax decisions,¹¹⁷ there is thus more justification for concluding that when Congress chooses to re-enact, without pertinent change, a provision which has been explicitly construed by the Supreme Court, it has accepted the Court's determination of legislative intent and adopted the gloss which the Court had placed on the statute.¹¹⁸

Yet, despite the arguments which might support an application of the "re-enactment rule" to prior opinions of the Court itself, the majority in *James* brushed aside reliance on the rule

¹¹⁷ See notes 69-70 *supra*.

¹¹⁸ Thus, in *Hecht v. Malley*, 265 U.S. 144 (1924), the Court held that the special excise tax imposed by the Revenue Act of 1916 upon corporations, joint-stock companies and associations "now or hereafter organized under the laws of the United States, or any state or territory" was not applicable to so-called "Massachusetts trusts," which were not organized under a statute. The language in the 1916 act constituted a verbatim re-enactment of a provision of the 1909 Corporation Tax Law, which the Court had previously construed as being applicable only to corporations, joint-stock companies, and associations which had been organized pursuant to statute. "In adopting the language used in an earlier Act, Congress must be considered to have adopted also the construction given by this court to such language and made it a part of the enactment." *Id.* at 153.

As previously indicated, in enacting § 61(a), the "gross income" provision of the 1954 Code, Congress adopted the language of its predecessor, § 22(a) of the 1939 Code, with only slight changes in form. See also *Francis v. Southern Pac. Co.*, 333 U.S. 445 (1948). *But cf.* *Girouard v. United States*, 328 U.S. 61 (1946), and *Brown*, *supra* note 116, at 391.

with a flat declaration that re-enactment of the provision in question would not necessarily prevent the Court from re-examining its prior decision in *Wilcox*.¹¹⁹

At first blush, such a declaration suggests that the "re-enactment rule" is now a dead letter in statutory construction cases, for if the rule's vitality with respect to prior decisions of the Court itself has been undercut, its vitality with respect to administrative and lower court determinations would seem to have been virtually obliterated. But before reaching any conclusions regarding the effect of the *James* decision on the future of the "re-enactment rule," it is necessary to recognize that at the time *James* was decided the picture was somewhat clouded by the Court's 1952 decision in the *Rutkin* case.

Although the majority in *Rutkin* declined to overrule *Wilcox*, and expressly limited that case to its facts, there is no doubt that the language used to sustain the holding that extorted funds were taxable might equally have applied to embezzled funds. As a result of the interpretation which *Rutkin* gave the "gross income" provision of the 1939 Code, the failure of Congress to make any clarifying changes in 1954 with respect to the tax status of embezzled funds does not present as strong a basis for application of the "re-enactment rule" as might otherwise have been the case. Indeed, the majority in *James* referred particularly to the *Rutkin* case as one reason why Congress in 1954 may have felt that specific action to change the *Wilcox* rule was unnecessary.¹²⁰ For that reason, it would be erroneous to conclude that the Court in *James* has sent the "re-enactment rule" to its final demise.

In the last analysis, therefore, the true significance of the *James* case with respect to this problem lies in its rather strong indication that, whenever the Court finds itself in disagreement with the interpretation given a particular statutory provision in a prior decision, it is not likely to feel hampered by either the "re-enactment rule" or the failure of Congress to legislate a change. The broad language of the Court's opinion in *James* might even be viewed as a warning to Congress that legislative approval of a particular decision may well go unrecognized in the absence of some *affirmative congressional action* indicating agreement with or, at least, acquiescence in the decision in question.

¹¹⁹ 366 U.S. at 220. See text at note 74 *supra*.

¹²⁰ 366 U.S. at 220-21. Interestingly enough, the administrative interpretation of the "gross income" provision, which was in accord with the *Wilcox* decision, was not changed when *Rutkin* was decided or when the 1954 Code was enacted.

IV. THE DECISION-MAKING PROCESS OF THE SUPREME COURT

A further feature, in some respects the most interesting, of the *Wilcox-Rutkin-James* development is the acute illustration which is afforded of several aspects of the Supreme Court's decision-making process. For the manner and method in which these cases were decided was quite clearly due to an interplay of: (1) the effect of changes in Court personnel, (2) the propensity of the Justices to express individual views, and (3) the frequent tendency of the Court to speak more, or less, broadly than is required under the circumstances.

It will be recalled that *Wilcox* was a seven-to-one decision. The majority opinion, written by Mr. Justice Murphy and holding that embezzled funds were not taxable because of the absence of a "claim of right" to the funds and the presence of an unconditional obligation to repay them, was joined in by Mr. Chief Justice Stone and Justices Black, Reed, Frankfurter, Douglas and Rutledge. Mr. Justice Jackson did not participate. Mr. Justice Burton, as the lone dissenter, argued forcefully that there was no basis for reading the "claim of right" test into the "gross income" provision, and reasoned that the readily realizable value derived from possession, dominion and enjoyment of embezzled funds was a sufficient basis for subjecting such funds to taxation.

When the extortion question was presented to the Court in *Rutkin* six years later, Stone, Murphy and Rutledge had been replaced by Mr. Chief Justice Vinson and Justices Clark and Minton. Mr. Justice Burton took full advantage of this opportunity to renew his assault on the *Wilcox* decision. In an opinion which read much the same as his *Wilcox* dissent, he argued that the economic value derived from control over the extorted funds brought them within the reach of section 22(a). In *Rutkin*, of course, Mr. Justice Burton carried the day, since his opinion was joined by all those who had not previously committed themselves to *Wilcox*—the three newcomers and Mr. Justice Jackson. But, although Burton's test of possession, dominion and enjoyment was seemingly as applicable to embezzled funds as it was to extortion receipts, the *Rutkin* majority declined to overrule *Wilcox*. In fact, Mr. Justice Burton appeared to be at pains to leave that decision on the books. "We do not reach in this case the factual situation involved in *Commissioner v. Wilcox*, 327 U.S. 404. We limit that case to its facts."¹²¹ The four dissenters in *Rutkin* were

¹²¹ 343 U.S. at 138. This was so despite the fact that certiorari had been granted,

Justices Black, Reed, Frankfurter and Douglas, all of whom had been in the *Wilcox* majority. Black, as the spokesman, vigorously argued as follows:

"A comparison of Mr. JUSTICE BURTON's opinion in this case with his dissent in the *Wilcox* case reveals beyond doubt that the Court today adopts the reasoning of his prior dissent, thereby rejecting the *Wilcox* interpretation of § 22(a). A tax interpretation which Congress has left in effect for six years is thus altered largely as a consequence of a change in the court's personnel."¹²²

Notwithstanding Mr. Justice Burton's statement that his opinion in *Rutkin* did not purport to reach the issue involved in *Wilcox*, the conceptual similarity between the embezzlement and extortion situations placed the lower courts in a quandary following the *Rutkin* decision. In general, the courts acknowledged the continued existence of *Wilcox*, but sought to distinguish it in order to hold the funds in question taxable under the *Rutkin* rationale.¹²³ When the Third Circuit held that corporate funds misappropriated by company officers were taxable under *Rutkin*, Judge Kalodner was prompted to comment in dissent:

"The plain import of the majority's position is that it construes *Commissioner v. Wilcox* to have been overruled by *Rutkin v. United States*, although it paid lip service to *Wilcox* in attempting to distinguish its factual situation from that in the instant cases. . . .

"Like John Alden, the Supreme Court of the United States can and should speak for itself. . . . Had the Supreme Court intended in *Rutkin* to overrule *Wilcox* it could, and undoubtedly would have said so."¹²⁴

But, interestingly enough, when the Second Circuit in 1955 applied the *Wilcox* rule *in favor* of a corporation president who had misappropriated company funds, but who had not been prose-

in the words of Mr. Justice Burton, "so as to pass upon the alleged conflict between that decision [*United States v. Rutkin*, 189 F.2d 431 (3d Cir. 1951)] and the decision in *Commissioner v. Wilcox*, 327 U.S. 404." *Id.* at 132.

¹²² *Id.* at 140.

¹²³ For example, the Eighth Circuit, in *Marienfeld v. United States*, 214 F.2d 632, 636 (8th Cir. 1954), commented, "We find it difficult to reconcile the *Wilcox* case with the later opinion of the Supreme Court in *Rutkin*." And in *Macias v. Commissioner*, 255 F.2d 23, 26 (7th Cir. 1958), the Seventh Circuit stated, "In our view the Court in *Rutkin* repudiated the holding in *Wilcox*; certainly it repudiated the reasoning by which the result was reached in that case."

¹²⁴ *Kann v. Commissioner*, 210 F.2d 247, 252 (3d Cir. 1953).

cuted for the crime of embezzlement,¹²⁵ the Supreme Court denied the Government's petition for certiorari.¹²⁶ At this time, Vinson and Jackson had been replaced by Mr. Chief Justice Warren and Mr. Justice Harlan. The Government's petition requested the Court to reconsider and overrule *Wilcox*, and thus Mr. Justice Burton was presented with another opportunity to establish the taxability of embezzled funds. For one reason or another, however, the necessary four votes for a grant of certiorari were not forthcoming. It was not to be expected, of course, that Black, Reed, Frankfurter and Douglas would have favored review, since they had agreed with *Wilcox* and dissented in *Rutkin*. But in addition to Burton, Justices Clark and Minton of the *Rutkin* majority remained on the Court, and Warren had availed himself of virtually all of Burton's past reasoning in his opinion for the Court in *Glenshaw Glass*. It may be that the deciding factor in the Court's denial of certiorari was the absence of a prosecution for embezzlement, which distinguished the case before it from *Wilcox*.¹²⁷ But by the same token, the Second Circuit's application of the *Wilcox* rule in the absence of such a prosecution might also have been viewed as an extension of *Wilcox* beyond its permissible reach in light of the *Rutkin* limitations.

When the Court agreed to reconsider the question of the taxability of embezzled funds in *James*, Mr. Justice Burton was no longer on the bench, and Reed and Minton had also retired. Justices Brennan, Whittaker and Stewart thus found themselves confronted with the issue for the first time. Mr. Chief Justice Warren, himself having fully adopted Burton's philosophy of the concept of taxable income in his opinion in *Glenshaw Glass*, now succeeded in convincing Justices Clark, Harlan, Brennan, and Stewart, and even Mr. Justice Frankfurter,¹²⁸ that *Wilcox* had been "thoroughly devitalized" and "effectively vitiated" by *Rutkin* and hence ought to be expressly overruled. Justices Black and

¹²⁵ *J. J. Dix, Inc. v. Commissioner*, 223 F.2d 436 (2d Cir. 1955).

¹²⁶ 350 U.S. 894 (1955).

¹²⁷ In this connection, Mr. Chief Justice Warren observed in his opinion in *James* that "this case [*James*] appears to be the first to arise that is 'on all fours' with *Wilcox*." 366 U.S. at 217.

¹²⁸ For some reason, Mr. Justice Frankfurter chose not to explain the reason for his switch of position in *James*. By way of contrast, when he changed his view on the deductibility, for federal estate tax purposes, of the bequest to charity of a remainder interest in a trust which might have been depleted for the benefit of the life tenant, Mr. Justice Frankfurter's brief dissent began with the statement that: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595, 600 (1949).

Douglas adhered to the *Wilcox* rule,¹²⁹ and Mr. Justice Whittaker also strongly argued in dissent that *Wilcox* should be preserved.

It took fifteen years for the switch to occur. During that time neither the issue nor the applicable statute had materially changed. There were, however, numerous changes in the Court's personnel, with the end result being the evolution of a lone dissent into the prevailing conception of taxable income. In finally establishing a definite rule of law regarding the taxability of all unlawfully obtained funds, the Court has hopefully put an end to the confusion which resulted from *Rutkin*'s general sweep, on the one hand, and its express limitation, on the other.

But while the taxability of embezzled funds was established by the vote of six members of the Court in *James*, none of the various grounds for actually disposing of the case commanded a majority view. On the question of the embezzler's criminal liability for having failed to report the embezzled funds as income, the six who had ruled in favor of taxability scattered in various directions. The Chief Justice reasoned that since "the statute contained the gloss placed upon it by *Wilcox*"¹³⁰ during the taxable years in question, the element of "willfulness" necessary to sustain a conviction for criminal tax evasion could not be proved.¹³¹ In voting to reverse the conviction on that ground, however, the Chief Justice was joined only by Justices Brennan and Stewart. Mr. Justice Harlan, together with Mr. Justice Frankfurter, argued that the trier of fact ought to be allowed to decide whether the embezzler had in fact relied on *Wilcox* in failing to report his embezzled funds as income.¹³² They would have remanded for

¹²⁹ Despite the consistency of his position, Mr. Justice Black did, however, back down somewhat from his remarks in his *Rutkin* dissent to the effect that the *Wilcox* and *Rutkin* decisions were irreconcilable. He stated in *James*: "There is no doubt that some of the reasoning in the *Rutkin* opinion rejected some of the reasoning in the *Wilcox* opinion. But this is true only with respect to the broad general standards formulated in the two cases." 366 U.S. at 235 (dissenting opinion).

¹³⁰ 366 U.S. at 231.

¹³¹ In view of Mr. Chief Justice Warren's declaration that *Rutkin* had "thoroughly devitalized" and "effectively vitiated" *Wilcox*, it is somewhat surprising that the statute was considered by the Chief Justice to have retained a "gloss" sufficient to preclude a conviction for tax evasion in years after 1952, when *Rutkin* was decided.

¹³² If the matter of reliance on *Wilcox* is to be left to the trier of fact, a question arises regarding the proper burden of proof. In a prosecution for criminal tax evasion, the ultimate burden of proof is upon the Government to establish beyond a reasonable doubt that the taxpayer willfully attempted to evade the tax. Under Mr. Justice Harlan's view, is the Government to prove non-reliance on *Wilcox*, or is the taxpayer to prove reliance? In *United States v. Moran*, 236 F.2d 361 (2d Cir.), cert. denied, 352 U.S. 909 (1956), the Court of Appeals for the Second Circuit was confronted with the appeal of a taxpayer who was convicted of tax evasion for failing to report funds obtained through extortion during taxable years after the *Wilcox* case had been decided but

a new trial. Mr. Justice Clark wrote a brief opinion urging that the conviction be upheld on the ground that as a matter of law *Wilcox* could not have been relied on in light of *Rutkin* and *Glenshaw Glass*, or in the alternative, that it was clear from the record the embezzler had placed no bona fide reliance on *Wilcox* in failing to report the funds as income.¹³³ The determinative votes with respect to the ultimate disposition of the case were supplied by Justices Black, Douglas and Whittaker, the dissenters on the question of taxability. By choosing to adhere to the *Wilcox* case, they necessarily favored a reversal of the conviction on the ground that the funds in question did not constitute taxable income.

While the taxpayer thus was successful in having his conviction reversed, only three Justices expressly subscribed to the non-retroactivity rule, which would absolutely prevent the conviction for tax evasion of those who failed to report, before May 15, 1961, the date of the *James* decision, funds which they had previously embezzled.¹³⁴ In view of the divergent positions taken by the other

prior to the decision in *Rutkin*. The taxpayer argued that there was not sufficient proof of willfulness since he might have relied in good faith on the *Wilcox* case to preclude the taxation of extortion receipts. The Second Circuit upheld the conviction, rejecting the taxpayer's argument with the statement that, "It is enough to say that there was no evidence that the defendant had actually relied on the *Wilcox* case." 236 F.2d at 363. Thus, the Second Circuit apparently would require the taxpayer to prove reliance. On the other hand, in *Macias v. Commissioner*, 255 F.2d 23 (7th Cir. 1958), the Court of Appeals for the Seventh Circuit reversed the assessment of a civil fraud penalty against the wife of a taxpayer who had received "side payments" in the course of his business operation and had failed to report them as income on his joint returns during taxable years following *Wilcox* but before *Rutkin*. The court held that while the receipts clearly were income the Commissioner had failed to sustain his burden of proof with respect to fraud, stating that, in light of the *Wilcox* decision, the taxpayer had the right to believe that the amounts in question were not taxable income. The Commissioner had apparently argued that there was no proof that taxpayer had, in fact, relied upon the *Wilcox* case, but the court ruled that the burden of proof in that regard was upon the Commissioner and that the taxpayer was entitled to the benefit of the presumption that all persons know the law. Mr. Justice Harlan gave no definite indication in his opinion in *James* as to how the burden of proof question should be resolved.

¹³³ It is not entirely clear what Mr. Justice Clark had in mind in this connection. *Rutkin* was decided in 1952 and *Glenshaw Glass* in 1955. The taxpayer in *James* was convicted of tax evasion beginning in 1951.

¹³⁴ The so-called "prospective overruling" theory can be traced to *Great No. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932). It seems clear that the critical date, May 15, 1961, refers to the date an embezzler's return was due rather than the date of the embezzlement, notwithstanding the ambiguity in Mr. Chief Justice Warren's statement that "willfulness" could not be proved in a criminal prosecution for tax evasion so long as the statute contained the gloss placed upon it by *Wilcox* "at the time the alleged crime was committed." 366 U.S. at 221-22. Those who embezzled funds prior to the decision in *James*, but who were not required to report them *until after the date of the decision*, should not be deemed to lack the "willfulness" necessary to support a conviction for criminal tax evasion for failure to report such funds.

members of the Court, it seems clear that the *James* case establishes no definitive rule of law regarding past criminal liability for failure to report embezzled funds.

Surprisingly enough, however, the first two lower courts confronted with the question have construed the meaning of the *James* case in this regard in virtually the same manner. In the much-publicized case of *Beck v. United States*,¹³⁵ the Court of Appeals for the Ninth Circuit read *James* as precluding a conviction for criminal tax evasion with respect to funds embezzled but not reported while *Wilcox* was the controlling precedent. The court avoided reversing the conviction before it, however, by holding that at least part of the unreported funds in question may have been acquired other than by embezzlement; a new trial was accordingly ordered. In *Estate of R. L. Adame*,¹³⁶ the Tax Court indicated that *James* might even preclude the assessment of civil fraud penalties against a past embezzler. (Such a holding would represent a clear extension of Mr. Chief Justice Warren's position, since the Chief Justice was careful to limit his rule of prospective application to a "criminal prosecution" for tax evasion. The question of a past embezzler's civil fraud liability was not touched upon in *James*.)¹³⁷ In the end, however, the Tax Court held that since the taxpayer in question had previously been convicted of theft by false pretext rather than embezzlement, the *James* case was inapplicable. The fraud penalties were sustained under the rationale of the *Rutkin* case. The approach taken by the Tax Court in the *Adame* case unfortunately indicates that while *James* may no longer require the courts to struggle with the *Wilcox-Rutkin* dilemma in order to hold the funds in question taxable,¹³⁸ the various opinions written in *James* on the question of past criminal liability may well force a continuation of

¹³⁵ 298 F.2d 622 (9th Cir. 1962).

¹³⁶ 37 T.C. 807 (1962).

¹³⁷ Indeed, Mr. Justice Black expressly observed in his dissent in *James* that the civil tax liability of "past embezzlers" was left unclear by Mr. Chief Justice Warren's opinion. 366 U.S. at 224. One district court in Texas, however, has taken the extreme position that the prospective overruling of *Wilcox* by *James* precludes the assertion of civil fraud penalties against one who obtained funds illegally, though *not* by embezzlement, but failed to report such funds as income during years while *Wilcox* was the law. The Court quoted from Mr. Chief Justice Warren's opinion in *James*, and concluded that the prospective overruling rationale was equally applicable to civil fraud cases for the rather questionable reason that "proof of fraud in a civil action is in parity with the proof of willful evasion in a criminal prosecution." *In re Parr*, 205 F. Supp. 492, 496 (S.D. Tex. 1962). See also *Estate of Isaac Stromberg*, 1962 P-H TAX CT. MEM. ¶ 62246 (Oct. 23, 1962).

¹³⁸ See also, in this connection, *Cohen v. United States*, 297 F.2d 760, 768-69 (9th Cir. 1962).

the struggle in order to sustain convictions for pre-*James* tax evasion.

While both the Ninth Circuit and the Tax Court thus gave the liability aspect of the *James* case a fairly liberal reading, it is by no means certain that other lower courts will follow suit.¹³⁹ Rather, it seems likely that a certain amount of confusion will develop out of the failure of five members of the Court in *James* to reach agreement on the question of past criminal liability for the purpose of establishing a rule to be applied in future cases without the need for speaking out on the issue once again. Such a situation is particularly disturbing with respect to the question here involved, since some lower courts may refuse to upset convictions for tax evasion, only to learn subsequently that the Chief Justice's rule of prospective application in fact represents the position of a majority of the Court.¹⁴⁰ In view of the likelihood that numerous cases raising this precise question will have to be resolved by the lower courts, it would have been far more desirable for a majority of the Court to have reached agreement on an appropriate rule for determining past criminal liability.

In any event, the *James* case is by no means the first time that the Court has failed to establish a definitive rule of law with respect to a tax question which was likely to arise with some frequency. During its 1959 Term, the Court was called upon by the Government to provide more meaningful guidelines in the so-called "business gift" area. The result was a collection of six opinions of varying length and breadth, and the conclusion by a

¹³⁹ Thus, in *United States v. Wallace*, 300 F.2d 525 (4th Cir.), *cert denied*, 370 U.S. 923 (1962), the Court of Appeals for the Fourth Circuit observed that the question of an embezzler's past criminal liability was not conclusively settled by the Court's decision in *James*. At issue was the validity of an attorney's conviction for assisting his client to evade taxes during the years 1951 through 1953. The unreported funds in question consisted of various amounts received by the taxpayer as rentals due his wholly-owned hotel corporation, plus amounts expended by the corporation on behalf of the taxpayer. On appeal, the attorney argued for the first time that the funds in question had been embezzled by the taxpayer, and under *James* there could be no conviction for tax evasion with respect to funds embezzled in the past. The court held that the question whether the funds were in fact embezzled was a question of fact which it would not consider for the first time on appeal. In the course of its opinion, the court reviewed the various opinions which were written in *James*, and pointed out that only three members of the court who voted to overrule *Wilcox* also voted to reverse the taxpayer's conviction for tax evasion.

¹⁴⁰ In this connection, Mr. Justice Black's statements on the prospective overruling of *Wilcox* are somewhat confusing. At one point, he stated: "Mr. Justice Douglas and I dissent from the Court's action in 'overruling' *Wilcox* and from the prospective way in which this is done." 366 U.S. at 223. At another point, he stated: "We do not challenge the wisdom of those of our Brethren who refuse to make the Court's new tax evasion crime applicable to past conduct." *Id.* at 224.

majority of the Court in *Commissioner v. Duberstein*¹⁴¹ that matters of this sort are best resolved, in the words of Mr. Justice Brennan, by "the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case."¹⁴² In the companion *Kaiser* case,¹⁴³ which raised what was perhaps a more precise question with which to deal, and in which a definite rule would have been not only more desirable but more plausible, the Court was unable to present even a majority view. The only point on which five members of the Court agreed was that strike benefits were within the reach of the "gross income" provision, which as it turned out was not determinative of the case.¹⁴⁴ The conflicting approaches of those who upheld the jury's verdict left the *Kaiser* case, for all practical purposes, as standing for the sole proposition that strike benefits paid in circumstances similar to those of the Kohler strike were not taxable to a recipient whose trier of fact found them to be gifts.¹⁴⁵ Again, the desire to express individual views apparently outweighed the sentiment favoring a definite resolution of the question.

Why does this propensity to express individual views exist? With respect to questions of broad public importance, it is not surprising to find a desire on the part of the Justices to expound their personal philosophies. In such cases proper exercise of the power and responsibility vested in each of the nine men on the Court frequently requires a full exposition of individual views. But in cases involving questions which are less significant in their impact upon society as a whole, an expression of individual views often serves merely to frustrate the quest for a clear-cut rule of law.¹⁴⁶ Of course, each member of the Court is acutely aware of

¹⁴¹ 363 U.S. 278 (1960).

¹⁴² *Id.* at 289.

¹⁴³ 363 U.S. 299 (1960), discussed at greater length earlier in this article.

¹⁴⁴ In Hauser, *Business Gifts and the Supreme Court*, 38 TAXES 942, 949 (1960), it was suggested that the "pity" of the *Kaiser* case was the Court's failure to deal with the "income" question. While it is true that the full Court did not express an opinion on that question, it is clear that a majority of the Court agreed that strike benefits were within the reach of the "gross income" provision of the Code.

¹⁴⁵ In this connection, see Rev. Rul. 61-136, 1961-2 CUM. BULL. 20, stating that strike benefits will be considered nontaxable gifts in cases "presenting facts substantially like those in the *Kaiser* case," but that other cases "will be scrutinized to determine whether the payments constitute gross income for Federal income tax purposes." *Id.* at 21.

¹⁴⁶ In this connection, see *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), involving the right of members of a labor union to prevent the union's use of their dues for political purposes, in which Mr. Justice Douglas joined the opinion of the Court solely for the purpose of allowing a judgment to be entered. As he stated: "Although I recognize the strength of the arguments advanced by my Brothers Black and

the power which he possesses, in varying degree, to mold and shape the law of his times. A desire to exercise this power at the appropriate moment and in the most forceful way, therefore, must be primarily responsible for the frequency with which individual views are expressed. There are, no doubt, numerous instances in which a strong minority opinion has ultimately become the law, and one of the best illustrations of the effect which an individual view might have in shaping future decisions is in the *Wilcox-Rutkin-James* development itself.¹⁴⁷

It is significant, however, that since there was a seven-man majority in *Wilcox*, Mr. Justice Burton's lone dissent did not interfere with the immediate effort to establish a governing rule of law. No harm was done to the Court's decision-making process. A far more serious question as to the justification for an expression of individual views arises in cases such as *James*, when a majority of the Court is prevented from reaching agreement on a proper disposition of the case before it. The breakdown which thus results in the decision-making process serves to weaken the Court's role as final arbiter of the questions brought before it. But perhaps the explanation—if not the justification—for the expression of individual views in such a situation lies in the even brighter prospects which are afforded members of the Court for using judicial power to shape future law.

V. CONCLUSION

While the various aspects of the *James* case may appear somewhat diverse in nature, there is a common thread running through them. In each phase of the Court's decision—whether it be expanding the concept of taxable income, avoiding the related question of enforcement, weighing the significance of congressional inaction and statutory re-enactment, or wrestling with the question of criminal liability—the presence of what might be called “judicial footwork” is readily discernible.

Whittaker against giving a ‘proportional’ relief to appellees in this case, there is the practical problem of mustering five Justices for a judgment in this case. Cf. *Screws v. United States*, 325 U.S. 91, 134. So I have concluded *dubitante* to agree to the one suggested by Mr. Justice Brennan, on the understanding that all relief granted will be confined to the six protesting employees.” *Id.* at 778-79.

¹⁴⁷ An earlier phase in the development of the concept of “gross income” which was in large part due to the efforts of individual Justices consisted of the Holmes-Brandeis series of cases which were decided following *Eisner v. Macomber*, 252 U.S. 189 (1920). See generally on this point, Wright, *The Effect of the Source of Realized Benefits Upon the Supreme Court's Concept of Taxable Receipts*, 8 STAN. L. REV. 164, 179-93 (1956).

Thus, in holding that embezzled funds are taxable to the embezzler in the year of misappropriation, the six-man majority in *James* by-passed the directly-in-point *Wilcox* decision and chose to rely instead on the factually distinguishable *Rutkin* case. In so choosing, it became necessary for the *James* majority to overrule *Wilcox*, something which the *Rutkin* majority had previously declined to do.

Moreover, in *Wilcox* and *Rutkin* only the applicability of the disjunctive catchall definition of "gross income" contained in section 22(a) of the 1939 Code was involved, while in *James* both that provision and its remodeled successor, section 61(a) of the 1954 Code, were applicable. But the legislative history of section 61(a), which expressly declared that the streamlined, "shotgun" definition of "gross income"—"all income from whatever source derived"—was "based upon the sixteenth amendment and the word 'income' is used in its constitutional sense,"¹⁴⁸ posed little problem for the Court. True, the Government could no longer effectively argue that embezzled funds were taxable simply as realized "gains," outside the scope of the "direct tax" clause, whether or not they constituted "income"—an argument which it had successfully advanced under the disjunctive section 22(a) with respect to the punitive damages "windfall" involved in *Glenshaw Glass*. True, also, the Court could no longer rely on the phrase "gains . . . derived from any source whatever" in the disjunctive section 22(a) to hold embezzled funds taxable, as it had done in *Glenshaw Glass* in holding punitive damages taxable. Nevertheless, the majority in *James* had no trouble reading into section 61(a), and thus into the sixteenth amendment, the broad concepts of taxable income it had enunciated under old section 22(a), culminating in *Glenshaw Glass*, notwithstanding the fact that such concepts may have been intended to encompass something more than sixteenth amendment "income" at the time they were first declared.¹⁴⁹

And although the distinction between the embezzler's complete lack of title and the extortioner's voidable title is now inconsequential insofar as section 61(a) is concerned, that distinction remains quite meaningful with respect to the related problem of enforcement through attachment of a federal tax lien. As long as the Court adheres to the *Aquilino* rule, that the taxpayer's

¹⁴⁸ See note 39 *supra*.

¹⁴⁹ In this connection, see Wright, *supra* note 147, at 202-03.

"property and rights to property" against which a lien attaches are to be determined under state law, embezzled funds traceable in the hands of the embezzler could not be subjected to a federal tax lien. Yet the *James* majority declined to rebut the dissenters' dubious argument that such funds would be subjected to a lien to the detriment of the embezzlement victim, perhaps because it did not relish explaining the apparent lack of correlation which results when embezzled funds are subjected to a tax but not subjected to a lien, a situation which stems directly from the conclusion that such funds were includible in the embezzler's "gross income."

Another obstacle which confronted the majority in its efforts to overrule the *Wilcox* case was the evidence suggesting that Congress may have viewed *Wilcox* as representing a proper construction of the "gross income" provision. It will be recalled that no attempt was made to amend the statute immediately following the *Wilcox* decision, that no substantive change was made in the "gross income" provision when it was re-enacted in streamlined form in 1954, and that neither of the two bills introduced in the House after adoption of the 1954 Code, which would have subjected embezzled funds to tax, was reported out of committee. The majority adroitly sidestepped this evidence, pointed to *Rutkin* as a possible basis for congressional inaction, and concluded that under the circumstances the Court was free to reconsider and overrule the *Wilcox* decision.

Yet, with respect to the ultimate question of the embezzler's criminal liability for income tax evasion, the Court scattered here and there and failed to reach any semblance of agreement on the proper basis for disposing of the case. Reversal of the embezzler's conviction was in fact achieved through the agreement of conflicting minorities, a result somewhat reminiscent of the Court's decision in the *Kaiser* case a year earlier, in which five members of the Court agreed that strike benefits constituted "gross income," but two of the five found "special circumstances" which compelled them to join with the remaining four in upholding the jury's verdict that the benefits were excludable "gifts."

In the final analysis, therefore, while its precise holding that embezzled funds are taxable may not prove exceedingly significant, the *James* case has indeed provided a remarkable study of the Supreme Court at work.